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Roger Alford (General Editor) (Notre Dame Law School), Crina Baltag (Managing Editor) (Stockholm University), and Monique Sasson · Sunday, August 6th, 2023

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The ITA Board of Reporters have reported on the following court decisions.

Fundação Rede Ferroviária de Seguridade Social Refer & Eletra Fundação Celg de Seguros e Previdência v. Stiebler Arquitetura e Incorporações Ltda – Massa Falida, Spe S&G Empreendimentos Imobiliarios Ltda & Spe S&G Empreendimentos S.A., Superior Court of Justice of Brazil, Recurso Especial Nº 1.959.435 – RJ (2021/0289749-6), 30 August 2022

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Third Chamber of the Superior Court of Justice ("STJ") has ruled that State courts cannot invalidate an arbitration agreement on the basis of one of the parties' financial insolvency caused by bankruptcy.

Raphael Brandão Moreira & Brandão & Valgas Serviços Médicos Ltda. v. ESHO Empresa De Serviços Hospitalares S.A., Court of Justice of the State of São Paulo, Apelação Cível n° 1097621-39.2021.8.26.0100, 06 December 2021

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeal of São Paulo ruled by a majority that an arbitrator did not breach his duty of disclosure when the information that should have been disclosed was public and easily accessible to the parties. Furthermore, the court clarified that a violation of an arbitrator's duty of disclosure,

per se, does not cause the annulment of the arbitral award.

U.R.V. Ltda., N. M. B. I. & E. de G. de R. I. v. C. dos P. de C. & Á do E. de S. P., Court of Justice of the State of São Paulo, Agravo de Instrumento n° 2272139-63.2022.8.26.0000, 28 March 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeal of São Paulo granted an interlocutory appeal to suspend the effects of an arbitral award rendered in an arbitral proceeding. The Court recognized, prima facie, the violation of the principle of impartiality and, consequently, a threat to Brazilian public policy. According to the Court, the chairman of the arbitral tribunal failed to disclose that he had previously represented one of the parties. This fact raised justifiable doubts regarding the arbitrator's impartiality. Consequently, it was recognized that the chairman of the arbitral tribunal breached his duty of disclosure, which could undermine his impartiality and lead to setting aside of the arbitral award.

B.A.M. v. C. M. B., R. G., S. M. H., M. M., L. A. M., T. M. & H. S. e S.P., Court of Justice of the State of São Paulo, Apelação Cível n° 1028511-89.2017.8.26.0100, 18 October 2022

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeal of São Paulo denied an appeal in which the Appellants challenged an arbitral award based on article 32 of the Brazilian Arbitration Act, alleging that the arbitral award had exceed the limits of the terms of reference and that the arbitrators had violated the principle of due process of law, as well as breached its obligation to state reasons. The Court determined that none of the requirements outlined in article 32 of the Brazilian Arbitration Act had been met and emphasized that the arbitral award could not be declared null and void based on an alleged erroneous decision on the merits of the award.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2021/4695, Case No. 2022/6134, 21 September 2021

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The 11th Civil Chamber of Court of Cassation ("Court of Cassation") ruled that Article 427 of the Code of Civil Procedure No. 6100 ("CCP") on the extension of the arbitration term is not a mandatory provision and, therefore, the parties are free to agree on the rules applicable to the extension of the time limit for the arbitration under their arbitration agreement or terms of reference.

X v. Y, Court of Cassation of Turkey, 3rd Civil Law Chamber, File No. 2022/1754, Case No. 2023/138, 19 January 2023

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The 3rd Civil Chamber of the Istanbul Regional Court ("Regional Court") ruled that the enforcement of a foreign arbitral award or its recognition as conclusive evidence or final judgment under the International Private and Procedural Law ("IPPL") depends on the recognition or enforcement of such award, which requires that the relevant award be properly finalized.

Radisson Hotels APS Danmark v. Hayat Otel I?letmecili?i Turizm Yat?r?m Ve Ticaret Anonim ?irketi [2023] EWHC 892 (Comm), High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, Case No. CL-2022-000037, 21 April 2023

Nicholas Fletcher, 4 New Square, ITA Reporter for England & Wales

Under section 73 of the English Arbitration Act 1996, a party seeking to challenge an award on the grounds that the proceedings have been improperly conducted, that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or that there has been any other irregularity affecting the tribunal or the proceedings, may not subsequently raise that objection before the tribunal or the court, unless he shows that, at the time when he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection. The fact that the challenge relates to a separate and distinct phase of the proceedings on which a partial final award has been issued and the continued participation relates to a subsequent phase is of no avail. The underlying purpose of the provision is to prevent a party from keeping an objection up its sleeve only to be deployed if and when it chooses.

Danila Mera v. SA Hospitality Group et al., United States District Court, Southern District of New York, No. 1:23-cv-03492 (PGG) (SDA), 03 June 2023

Emma Iannini, King & Spalding LLP, ITA Reporter for the United States of America

The Plaintiff, Danila Mera ("Mera" or "Plaintiff"), brought an action against the Defendants, SA Hospitality Group, LLC, Café Focaccia, Inc., Eighty Third and First LLC, Felice Gold Street LLC, Felice Chambers LLC, Felice 240 LLC, Felice Hudson LLC, Felice Roslyn, and Felice Montague, LLC (the "Corporate Defendants") and Dimitri Pauli and Jacopo Giustiniani (the "Individual Defendants" and together with the Corporate Defendants, the "Defendants") asserting claims under the Fair Labor Standards Act ("FLSA") (Count I), the New York Labor Law ("NYLL") (Count II), the New York State Human Rights Law ("NYSHRL") (Count III), and the New York City Human Rights Law ("NYCHRL") (Count IV). Mera's FLSA and NYLL claims arose from alleged unpaid wages and his NYSHRL and NYCHRL claims arose from an alleged hostile work environment due to sexual orientation discrimination on the part of the Corporate Defendants, the Individual Defendants, and their employees. The Defendants moved to compel Mera to arbitrate all of his claims or, in the alternative, to stay the entire action before the Southern District of New York ("SDNY") court.

Mera argued that the Defendants discriminated against him in violation of the NYSHRL and the NYCHRL (Counts III and IV, respectively) by subjecting him to constant harassment and abuse on account of his sexual orientation. Starting just after a month that Mera was hired, he complained that his co-workers and manager would call him "puto," "pato," or "marica," all of which are

homophobic slurs in Spanish. Mera's co-workers would also come close to him, touch his legs, wrist, and waist and ask things like "did you have good sex during your vacation". Mera also claimed against the Corporate Defendants for unpaid wages under the FLSA and NYLL (Counts I and II, respectively).

Upon beginning his employment with the Defendants at Café Focaccia on 1st Avenue in New York City, Mera had signed a contract including a broadly-worded arbitration agreement ("Arbitration Agreement" or "Agreement") governed by the Federal Arbitration Act ("FAA") ostensibly requiring him to arbitrate all employment-related contract claims with Defendants. However, a newly enacted federal statute passed by Congress in 2021, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "EFAA"), allowed claimants bringing sexual harassment or assault disputes to escape otherwise binding employment arbitration clauses and instead choose to litigate their sexual harassment or assault claims in federal court.

The issue for the Court to resolve was two-fold: (i) whether Mera had alleged claims arising within the scope of the EFAA; and (ii) if so, whether the Arbitration Agreement was unenforceable as to only such claims or as to the entire case. Balancing the competing goals of the FAA and the EFAA, the SDNY ruled that Plaintiff's FLSA and NYLL claims for hours and lost wages were severable and unrelated to Plaintiff's claims under the NYSHRL and NYCHRL claims for sexual harassment, which did plead a dispute within the scope of the EFAA and thus were not subject to mandatory arbitration.

Accordingly, the Court granted and denied in part the Defendants' motion to compel arbitration. It stayed Mera's action regarding Counts I and II, but directed the Defendants to answer or move to dismiss Counts III and IV.

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